Supreme Court, U.S.
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No. 01-1643

IN THE

Supreme Court of the United States

KENNETH ALLEN GOLDBLATT,

Petitioner,

v.

A & W INDUSTRIES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Respondent, A & W Industries, Inc., has no parent corporation and no publicly held company owns 10% or more of its stock.

Pursuant to Supreme Court Rule 29.6, the Court is advised that Respondent has no parent company, and it has no subsidiaries that are wholly owned.

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STATEMENT OF THE CASE

Respondent disagrees with Petitioner's characterization of the Statement of the Case. The Court of Appeals correctly set forth the nature of the case on page 1 of its opinion. [Petitioner's Appendix B-1]. In addition, the Court of Appeals correctly set forth the Statement of Facts on pages B-2 and 3 of Appendix B as to the history of the proceedings in this case.

The record on appeal does not contain the several extraneous documents that are referred to in the Petition, to wit:

1) the May 11, 2000 money judgment and injunction entered by the Tarrant County Probate Court against the Petitioner, that was obtained by Respondent [Petition pg. 4];

2) the wrongful foreclosure action conducted by Petitioner before he was bankrupt (which was part of the factual basis that supports the Respondent's judgment described in subparagraph [1] above) [Petition pg. 3, 4];

3) the claimed establishment of the Petitioner's business homestead [Petition pg. 3, 4];

4) the claimed error of the bankruptcy court as to the Petitioner's residence homestead where Petitioner actually lives, sleeps, eats, and receives mail [Petition pg. 3];

5) the factual matters related to the eviction in the Justice Court of Tarrant County [Petition pg. 5]; and

6) the original appellate proceedings in the Second Court of Appeals in Ft. Worth that were filed by Respondent to prevent the Petitioner from continuing to violate a mandatory injunction by filing eviction proceedings against the Respondent in the Justice Court (subparagraph [5] above) [Petition pg. 5, 6].

The above matters are outside the record and are not available to support the Petitioner's claims because the Petitioner did not timely designate any of these matters for inclusion in the appellate record. Consequently, the Petitioner's references to the above factual events or matters contained in these documents are improper and not part of the "Statement of the Facts" that are referred to by Petitioner. The "burden of creating an adequate record rests with the appellant." *Matter of CPDC, Inc.*, 221 F.3d 693, 698 (5th Cir. 2000), 44 Collier Bankr. Cas. 2d 949

The only question that was decided by the Fifth Circuit Court of Appeals was whether the district court abused its discretion when it dismissed the Petitioner's appeal from the order of the bankruptcy court because the debtor as appellant failed to file his brief within the 20 day period required by Local Bankruptcy Rule 8009. The Fifth Circuit reviewed all of the facts connected with the district court's actual exercise of discretion and determined that no abuse of discretion had occurred. Consequently, the Fifth Circuit properly affirmed the judgment of the United States District Court. [Petitioner's Appendix B, pg. B-1 thru B-5].

The alleged error related to the business homestead question that is raised by Petitioner in this proceeding was not preserved for appeal, because the issue was not properly asserted by Petitioner in the United States District Court when

he failed to timely designate the record and designate the issues for appellate review pursuant to Bankr. R. Proc. 8006. Moreover, the Petitioner failed to timely file any brief that raised such issue in accordance with Local Bankr. R. Proc. 8009. Consequently, the question concerning the propriety or correctness of the bankruptcy court's decision as to the homestead status of the commercial real estate has been waived, and is not before this Court. *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362, 101 S. Ct. 1146, 67 L. Ed. 2d 287 (1981). Thus, Petitioner's Question I presented in the Petition is not before the Court.

REASONS FOR DENYING THE WRIT

I. The District Court Did Not Abuse Its Discretion.

Based on the record and the facts as set forth in the opinion of the Court of Appeals [Pet. Appendix B, pg. B-2 thru B-3], the Court of Appeals correctly decided the case by determining that the United States District Court did not abuse its discretion when it dismissed the Petitioner's appeal from the final order of the bankruptcy court. [Pet. Appendix B, pg. B-1].

II. The Court of Appeals Did Not Abuse its Discretion in Affirming the District Court.

Based on the record and the facts set forth in the opinion, the Court of Appeals did not abuse its discretion in affirming the judgment of the United States District Court [Pet. Appendix B, pg. B-1].

III. The Petition Does Not Merit Discretionary Review.

The Petitioner's application for writ of certiorari does not merit review by this Honorable Court as the decision below is not in conflict with a decision of another Circuit; has not departed from the accepted and usual course of judicial proceedings that would require this Court's supervisory power; nor decided an important federal question in a way that conflicts with other relevant decisions of this Court. Supreme Court Rule 10.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion.

The unpublished opinion of the Court of Appeals sets out the undisputed facts as to the Petitioner's failure to comply with Bankr. R. Proc. 8006 and Local Bankr. R. Proc. 8009 when the Petitioner's appeal was dismissed. The Petitioner belatedly filed a motion in the district court requesting leave to file the Record Excerpts to include additional matters in the appellate record, and to designate the issues that he wished to urge on appeal. The Respondent opposed the motion. [Pet. Appendix B, pg. B-2]. The district court denied the motion because the Petitioner did not affirmatively show sufficient facts that would demonstrate that the Petitioner's delay was the result of "excusable neglect" as permitted by Bankr. R. Proc. 9006(b)(1). [Pet. Appendix B, pg. B-2].

The judgment of the district court demonstrated that it considered all of the facts in support of and in opposition to the Petitioner's motion, as well as the applicable law. [Pet. Appendix A, pg. A-1]. The district court validly and

appropriately exercised its discretion and decided that the appeal should be dismissed because of the Petitioner's failure to comply with the applicable appellate rules. [Petitioner's Appendix A, pg. A-1]. In connection with its decision on the merits of Petitioner's motion the district court relied on *Matter of Braniff Airways, Inc.*, 774 F.2d 1303, 1305 (5th Cir. 1985). The district court could have also relied on *In re Serra Builders, Inc.*, 970 F.2d 1309, 1311 (4th Cir. 1992), *Nielsen v. Price*, 17 F.3d 1276, 1277 (10th Cir. 1994), and *Matter of M. A. Baheth Construction Co., Inc.*, 118 F.3d 1082, 1083-84 (5th Cir. 1997) which have similar facts and similar holdings.

The law that was applied by the district court was correct. Consequently, the district court's action in deciding against the Petitioner was not an abuse of discretion. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2460, 110 L. Ed. 2d 359, 58 USLW 4763 (U.S. Dist. Col. 1990).

The Petitioner has attempted to excuse his failure to comply with the appellate bankruptcy rules by trying to rely on his bankruptcy lawyer's failing health [Petition pg. 3, 2nd Issue]. However, the opinion of the Court of Appeals clearly demonstrates that the appeal was dismissed *not* because of a failure to act on the part of the bankruptcy lawyer but the failure to act on the part of the *substitute* lawyer who took over the case on appeal. *See* the factual analysis by the court on page B-4 of Petitioner's Appendix B. In this connection the Court of Appeals said:

> Counsel's travel schedule or absence from office is generally not sufficient to support a finding of excusable neglect. See *Airline Professionals Ass'n v. ABX Air, Inc.*, 109 F.Supp.2d 831, 834 (S.D.

> Oh. 2000) ("[C]ourts still demand that an attorney show more than a busy practice or absence from the office to merit an extension of time in which to file a notice of appeal.")

(Citation omitted). Pet. Appendix B, pg. B-4, 5. Clearly this statement and case citation in the Per Curiam opinion does not apply to any alleged conduct (or misconduct) on the part of the Petitioner's bankruptcy attorney. Instead, the Court is talking about the failure to act on the part of the appellate lawyer. Consequently, the Petitioner's attempt to rely on the uncited quotation that is on page 15 in his Petition from *In re John W. Schultz*, is misleading, and is not appropriate.[1]

Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 389, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993) affirms the long standing rule that the attorney's failures *are* attributable to the client. *See also Link v. Wabash Railroad Co.*, 370 U.S. 626, 635-636, 82 S. Ct. 1386, 1385-1386, 8 L. Ed. 2d 734 (1962) and *United States v. Boyle*, 469 U.S. 241, 105 S. Ct. 687, 83 L. Ed. 2d 622 (1985). Thus, the client is bound by not only by his lawyer's acts, but also his failure to act.[2]

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1. After research, Respondent believes that Petitioner is attempting to cite *In re John W. Schultz*, 254 B.R. 149 (6th Cir. B.A.P. 2000), 48 Fed. R. Serv. 3d 294, 36 Bankr. Ct. Dec. 261. The Petitioner incorrectly extracts a portion of two unconnected sentences from the opinion and inserts his own editorial comment in the middle. The facts in the *Schultz* case are not even close to the facts in this case.

2. In addition to the missed deadlines, the Petitioner's appellate attorney failed to file his documents with the proper clerk and then erroneously claimed that a designation of the record had been filed when it had not [Appendix B-2 n.2].

Excusable neglect has been defined by this Court as a flexible standard that requires a consideration of all of the circumstances. However, at its core it is nevertheless an *equitable* standard that requires a consideration of how the court's decision will affect both parties, and the *bona fides* of the Petitioner. *Pioneer Investment Services Co.*, 507 U.S. 380, 392 n.10 (1993). In this case the district court did consider all of the circumstances, including the equitable issues.

Moreover, this Court stated in *Wayte v. United States*, 470 U.S. 598, 105 S. Ct. 1524, 84 L. Ed. 2d 547, 53 USLW 4319 (U.D. Cal. 1985) that

> The abuse of discretion standard acknowledges that appellate courts in general, and this Court in particular, should not expend their limited resources making determinations that can profitably be made only at the trial level. *Cf. Anderson v. Bessemer City*, 470 U.S. 564, 573-576, 105 S. Ct. 1504, 1511-1513, 84 L. Ed. 2d 518 (1985); *Florida v. Rodriguez*, 469 U.S. 1, 12, 105 S. Ct. 308, 314, 83 L. Ed. 2d 165 (1984) (Stevens, J. dissenting).

The Petitioner attempts to rely on *Matter of CPDC, Inc.*, 221 F.3d 693 (5th Cir. 2000) which reversed a district court that had dismissed an appeal for failure to timely designate the appellate issues in accordance with Bankr. R. 8006. However, the Court of Appeals correctly pointed out that the *CPDC* decision does not apply because the appellant's brief was filed simultaneously with the motion to extend time. No harm occurred because there was no delay to the other parties [Pet. Appendix B, pg. B-5 n.4]. In this case, the Petitioner failed to timely file:

(i) Petitioner's brief;

(ii) the record excerpts; and

(iii) the designation of issues.

The Petitioner did nothing, and when he did file something, it was filed in the wrong place [Pet. Appendix B, pg. B-2 n.2]. Thus, the district court did not abuse its discretion when it ruled against the Petitioner.

II. The Court of Appeals Did Not Abuse Its Discretion in Affirming the District Court.

Respondent asserts that the Court of Appeals did not abuse its discretion in affirming the district court. The Petitioner has not shown in his Petition any fact or circumstance which reflects that the Court of Appeals abused its discretion in affirming the district court's judgment.

Essentially the Petitioner claims that the district court and the Fifth Circuit abused their discretion because they failed to find "that the omissions of Goldblatt's bankruptcy attorney were the result of excusable neglect." [Petition pg. 12, parag. C]. That is, Petitioner disagrees with the result, and has not shown that either court erroneously applied the law to the facts as found regarding the existence of "excusable neglect."

In *Anderson v. Bessemer City, NC*, 4 U.S. 564, 573-574, 105 S. Ct. 1504, 1511-1512, 84 L. Ed. 2d 518 (1985) Justice White said

> If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it

> even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact finder's choice between them cannot be clearly erroneous."

In *Cooter & Gell v. Hartmarx Corporation*, 496 U.S. 384, 405, 110 S. Ct. 2447, 2460, 110 L. Ed. 2d 359, 58 USLW 4763 (U.S. Dist. Col. 1990), Justice O'Conner said

> A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence.

In the case at bar, neither the district court nor the Court of Appeals based its ruling on an erroneous view of the law, or on a clearly erroneous assessment of the evidence. Consequently, the decision of the Court of Appeals is correct, and the Petition for writ of certiorari should be denied.

III. The Petition Does Not Merit Discretionary Review

While the Petitioner attempts to complain of the hardship he has suffered at the hands of either the Respondent due to adverse decisions by the state trial court, and the bankruptcy court,[3] in the end those decisions were lawfully made by Judges who had the power to make those decisions in trials or hearings that afforded the Petitioner all rights to which he was entitled. The process was not unconstitutional as he had his day in court, and the decisions were not contrary to applicable law. Moreover, the Petitioner had an adequate

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3. None of which are supported by appropriate references to an appellate record.

appellate remedy available to him in the bankruptcy court and failed to follow through with the appeal in a timely way. That circumstance does not mean that this case should be reviewed by this Court, as there are no "compelling reasons" that have been set out in the Petition for granting review. Supreme Court Rule 10.

Further, the Petitioner has not pointed out where the decision by the Court of Appeals is in conflict with another circuit on the same important matter, or has decided an important federal question in a way that is in conflict with a decision of the Texas Supreme Court. Supreme Court Rule 10(a). The only question that was decided by the Court of Appeals was whether the district court abused its discretion when it dismissed the Petitioner's appeal. Since abuse of discretion was not shown, then this Court should not grant review. The case may be important to Petitioner, but it does not decide an issue that is important to the jurisprudence of the United States, or the Circuit Courts of Appeal.

The last paragraph of Supreme Court Rule 10 expressly provides:

> A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Neither circumstance is true in this case, but even if the point were conceded (which it is not), such matter does not constitute grounds for granting the writ in this case.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari filed herein.

Respectfully submitted,

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